

JEREMIAH W. (JAY) NIXON,  
Attorney General,  
Plaintiff,  
v.  
Discount Smoke Shop, Inc.  
9904 Clayton Road, Suite B  
Clayton, MO 63121  
serve: Dan J. Kazanas  
9904 Clayton Road, Suite B  
Clayton, MO 63121  
Registered Agent

3. Discount Smoke Shop, Inc. operates business establishments in the State of Missouri, including establishments within Greene County. Those establishments offer for sale to the public various tobacco products.

4. This Court has subject matter jurisdiction over this action pursuant to § 407.100, RSMo 1994.

5. This Court has personal jurisdiction over Discount Smoke Shop, Inc. because Discount Smoke Shop, Inc. is a Missouri corporation, has transacted and continues to transact business within the State of Missouri, and all acts giving rise to the causes of action described in this petition took place in the State of Missouri.

6. Venue is proper in this Court pursuant to § 407.100.7, RSMo 1994 and/or §§ 508.010 and 508.040, RSMo 1994 because one or more of the acts which are alleged to violate § 407.020 occurred in this judicial circuit and because Discount Smoke Shop, Inc. transacts business within this circuit.

### **Background on Tobacco and Youth**

7. According to the Federal Food and Drug Administration, more than 80% of tobacco users began their habit before the age of 18.

8. According to the Federal Food and Drug Administration, the average adolescent tobacco user begins to smoke at 14 & 1/2 years of age and becomes a daily smoker before the age of 18.

9. According to The Campaign for Tobacco Free Kids, 27,000 Missouri children under the age of 18 become new daily smokers each year.

10. According to the Federal Food and Drug Administration, of the 3000 young people throughout the United States who become regular smokers each day, nearly one-third will have their lives shortened by tobacco-related diseases.

11. According to the Institute for Health Policy of the Heller Graduate School at Brandeis University, most adolescent smokers purchase tobacco products at retail stores, even though the sale of tobacco products to a minor is prohibited in every state.

12. Since 1992, §§ 407.931.1 and 407.931.2 RSMo have made it illegal in the State of Missouri to sell or distribute tobacco products to persons under the age of 18 years.

13. Beginning in 1998, the Missouri Department of Mental Health, Division of Alcohol and Drug Abuse ("DMH"), in conjunction with the federal Food and Drug Administration ("FDA"), conducted compliance checks on establishments selling tobacco products to ascertain which establishments sell tobacco products to minors. For each compliance check, DMH engaged the services of an adult agent and a minor under 18 years of age. The minor entered an establishment and requested to purchase a tobacco product. If asked his or her age, the minor responded truthfully. If asked for identification the minor produced a document that accurately reflected his or her age or responded that he or she did not possess any identification, if that were in fact the case. At no time during any compliance check did the minor misrepresent his or her age to the establishment. The adult agent who accompanied the minor to the establishment location recorded the result of each purchase attempt. These compliance checks in cooperation with the FDA ceased on March 21, 2000, when the United States Supreme Court declared that the FDA lacked any authority to regulate the sale or delivery of tobacco products.

14. Between January 1, 1998, and March 21, 2000, DMH conducted a total of 8,289 compliance checks in the State of Missouri, of which 2,320 or 28% resulted in illegal sales of tobacco to a minor.

## **The Missouri Merchandising Practices Act**

15. Section 407.020, RSMo provides, in pertinent part:

The act, use, or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce or the solicitation of any funds for any charitable purpose, as defined in Section 407.453, in or from the state of Missouri, is declared to be an unlawful practice. ... Any act, use or employment declared unlawful by this subsection violates this subsection whether committed before, during, or after the sale, advertisement or solicitation. [Emphasis added]

16. Section 407.100, RSMo 1994, provides:

1. Whenever it appears to the attorney general that a person has engaged in, is engaging in, or is about to engage in any method, act, use, practice or solicitation, or any combination thereof, declared to be unlawful by this chapter, the attorney general may seek and obtain, in an action in a circuit court, an injunction prohibiting such person from continuing such methods, acts, uses, practices, or solicitations, or any combination thereof, or engaging therein, or doing anything in furtherance thereof.

2. In any action under subsection 1 of this section, and pursuant to the provisions of the Missouri Rules of Civil Procedure, the attorney general may seek and obtain temporary restraining orders, preliminary injunctions, temporary receivers, and the sequestering of any funds or accounts if the court finds that funds or property may be hidden or removed from the state or that such orders or injunctions are otherwise necessary.

3. If the court finds that the person has engaged in, is engaging in, or is about to engage in any method, act, use, practice or solicitation, or any combination thereof, declared to be unlawful by this chapter, it may make such orders or judgments as may be necessary to prevent such person from employing or continuing to employ, or to prevent the recurrence of, any prohibited methods, acts, uses, practices or solicitations, or any combination thereof, declared to be unlawful by this chapter.

\* \* \* \* \*

6. The court may award to the state a civil penalty of not more than one thousand dollars per violation; except that, if the person who would be liable for such penalty shows, by a preponderance of the evidence, that a violation resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid the error, no civil penalties shall be imposed.

7. Any action under this section may be brought in the county in which the defendant resides, in which the violation alleged to have been committed occurred, or in which the defendant has his principal place of business.

17. "Merchandise" is defined by § 407.010(4) as "any objects, wares, goods, commodities, intangibles, real estate or services[.]"

18. "Person" is defined by § 407.010(5) as "any natural person or his legal representative, partnership, firm, for profit or not for profit corporation, whether domestic or foreign, company, foundation, trust, business entity or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee or cestui que trust thereof[.]"

19. "Sale" is defined by § 407.010(6) as "any sale, lease, offer for sale or lease, or attempt to sell or lease merchandise for cash or credit[.]"

20. "Trade" or "commerce" is defined by § 407.010(7) as "the advertising, offering for sale, sale, or distribution, or any combination thereof, of any services and any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or thing of value wherever situated. The terms 'trade' and 'commerce' include any trade or commerce directly or indirectly affecting the people of this state." 21. 15 CSR § 60-8.020 defines "unfair practice" as follows:

(1) An unfair practice is any practice which -

(A) Either -

1. Offends any public policy as it has been established by the Constitution, statutes or common law of this state, or by the Federal Trade Commission, or its interpretive decisions; or

2. Is unethical, oppressive or unscrupulous; and

(B) Presents a risk of, or causes, substantial injury to consumers.

(2) Proof of deception, fraud or misrepresentation is not required to prove unfair practices as used in section 407.020.1, RSMo.

22. 15 CSR 60-8.090 defines "illegal conduct" as follows:

(1) It is an unfair practice for any person in connection with the advertisement or sale of merchandise to engage in any method, use or practice which--

(A) Violates state or federal law intended to protect the public; and

(B) Presents a risk of, or causes substantial injury to consumers.

### **Missouri Tobacco Laws**

23. Section 407.931.1, RSMo states that, "It shall be unlawful for any person to engage in tobacco product distribution to persons under eighteen years of age."

24. Section 407.931.2, RSMo states in pertinent part that, "No person shall sell any tobacco product or distribute any tobacco product or rolling papers to any minor."

25. The term "distribution" as used in Section 407.931.1, RSMo is defined in Section 407.925(2), RSMo as "a conveyance to the public by sale, barter, gift or sample."

26. The term "tobacco product" as used in Section 407.931.1, RSMo is defined in Section 407.925(10), RSMo as "any substance containing tobacco leaf, including, but not limited to cigarettes, cigars, pipe tobacco, snuff, chewing tobacco, or dipping tobacco."

27. It is the public policy of the State of Missouri that the distribution of tobacco products to minors is unlawful.

28. In the State of Missouri the distribution or sale of tobacco products to minors is an unlawful practice prohibited by Section 407.020.1, RSMo.

## **COUNT I**

### **Unfair practice by Discount Smoke Shop, Inc.**

29. The Attorney General incorporates by reference paragraphs 1 through 28 above as if fully set forth herein.

30. Since January 1, 1998, twenty-four (24) compliance checks have been performed at Discount Smoke Shop, Inc. stores throughout the State of Missouri. Twelve (12) of the compliance checks resulted in illegal sales of tobacco products to minors. In other words, 50% of the compliance checks performed at Discount Smoke Shop stores in Missouri resulted in illegal sales of tobacco to minors. This rate is higher than the statewide rate for all retail establishments during the same period (28%).

31. On the dates and locations indicated below, Discount Smoke Shop, Inc. sold and did otherwise distribute tobacco products to a person under the age of 18 years, engaged by DMH to assist in conducting compliance checks:

<u>Date</u>	<u>Location</u>
9/21/98	1126 N. Florissant Rd., Ferguson, MO 63135

2/16/99	1126 N. Florissant Rd., Ferguson, MO 63135
9/9/98	12761 New Halls Ferry Rd., Florissant, MO 63033
2/13/99	12761 New Halls Ferry Rd., Florissant, MO 63033
10/7/99	4807 N. Lindbergh Blvd., Hazelwood, MO 63044
2/8/99	4825 N. Lindbergh Blvd., Hazelwood, MO 63044
11/30/99	4825 N. Lindbergh, Hazelwood, MO 63044
10/10/98	820 West Main St., Jackson, MO 63755
2/7/00	2845 W. Chestnut Expy, Ste. B, Springfield, MO 65802
12/1/99	2845 W. Chestnut Expy, Ste. B, Springfield, MO 65802
8/6/99	10507 St. Charles Rock Rd., St. Ann, MO 63074
10/7/99	10507 St. Charles Rock Rd., St. Ann, MO 63074

31. Discount Smoke Shop, Inc. did, therefore, on at least the occasions described above, commit acts which constitute an "unfair practice" that violates § 407.020 RSMo and is enjoined under § 407.100, RSMo.

32. Discount Smoke Shop, Inc. benefits financially from its illegal sales of tobacco to minors.

33. Discount Smoke Shop, Inc. has failed to take reasonable measures to prevent the selling of tobacco products to minors in its stores.

34. Discount Smoke Shop, Inc.'s failure has resulted in the commission of at least 12 instances of illegal conduct and unfair practices in violation of § 407.020.



**Prayer for Relief**

**WHEREFORE**, the Attorney General respectfully requests that this Court enter an Order:

- a) finding that Discount Smoke Shop, Inc. committed an unfair trade practices in violation of § 407.020 on 12 separate occasions by selling tobacco products to minors;
- b) finding that Discount Smoke Shop, Inc. committed unfair trade practices in violation of § 407.020 by failing to implement reasonable measures designed to prevent the illegal sale of tobacco products to minors at its stores;
- c) finding that Discount Smoke Shop, Inc. committed an unfair trade practice in violation of § 407.020 on 12 separate occasions since January 1, 1998, by engaging in tobacco product distribution to persons under eighteen years of age;
- d) directing that Discount Smoke Shop, Inc. shall, pursuant to Section 407.130, RSMo, pay to the State of Missouri, in addition to normal court costs, the cost of the investigation and prosecution of this action;
- e) assessing civil penalties against Discount Smoke Shop, Inc. pursuant to § 407.100, RSMo in such amount as the Court shall deem appropriate;
- f) permanently enjoining Discount Smoke Shop, Inc. from selling tobacco to minors;
- g) directing that Discount Smoke Shop, Inc. shall be deemed to have given its consent to future contacts between representatives of the Attorney General's office and/or the DMH and Discount Smoke Shop, Inc.'s agent/employees regarding the sale of tobacco products to minors;

h) indicating that any violation of the Court's order shall be subject to a civil penalty of not more than \$5,000.00 plus payment, in addition to normal court costs, of the cost of the investigation and prosecution of the violation.

i) any other relief this Court deems fair and reasonable.

Respectfully submitted,

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